No. 08-12-00331-CV

In The

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS
El Paso, Texas

LAURA S. WASSMER AND STEPHEN B. HOPPER,
Appellants,

v.

JO N. HOPPER,
Appellee/Cross-Appellant,

v.

JPMORGAN CHASE BANK, N.A.,
Appellee.

On Appeal from Cause No. PR-3238-3
Probate Court No. 3, Dallas County, Texas
Honorable Michael E. Miller, Presiding Judge

APPELLEE/CROSS-APPELLANT JO N. HOPPER'S REPLY BRIEF TO APPELLANTS' RESPONSE BRIEF

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REFERENCES TO PARTIES AND TERMS

Appellee/Cross-Appellant Jo N. Hopper is the surviving spouse of a 28-year marriage to Max D. Hopper. She is referred to herein as "Mrs. Hopper," the "Widow," or "Appellee/Cross-Appellant." Max D. Hopper is referred to herein as "Mr. Hopper" or "Decedent."

Appellants Laura S. Wassmer and Stephen B. Hopper are the adult children of Mr. Hopper from a decades-prior marriage, and thus are Mrs. Hopper's stepchildren. As discussed more fully throughout Mrs. Hopper's Brief and this Reply, Appellants are the only true heirs of Mr. Hopper's intestate estate at issue. Hence, they are referred to herein as the "Heirs," "Appellants" or "Appellant Heirs."

JPMorgan Chase Bank, N.A. is the independent administrator of the estate. It is referred to herein as "Independent Administrator" or "IA."

The terms "Robledo" or "residence" are used interchangeably to refer to the real property (land and buildings/improvements) located at No. 9 Robledo Drive, Dallas, Texas 75230, which Mr. and Mrs. Hopper purchased as community property. When Robledo is referred to herein by the capitalized term "Homestead," it is not referring to Robledo as shared by Mr. and Mrs. Hopper, but rather to a Texas Constitutional Homestead as provided in Article XVI, §§ 52 and 51 of the Texas Constitution.

For convenience and to avoid confusion, the competing motions for summary judgment filed in the trial court are also abbreviated. Mrs. Hopper's Motion for Partial Summary Judgment, filed on November 30, 2011, is referred to herein as "Mrs. Hopper's MSJ" or "Plaintiff's MSJ." (CR 17.) The Heirs' Second Amended Motion for Partial Summary Judgment, filed in January of 2012, is abbreviated as "Heirs' Second Amended MSJ." (CR 142.)

Further, Mrs. Hopper's Motion to Dismiss for Lack of Standing, filed in this Court on January 11, 2013, is referred to herein as "Motion to Dismiss." Also, on April 23, 2013, Mrs. Hopper filed a Reply to Appellee/Cross Appellee JPMorgan Chase Bank, N.A.'s Brief. It is abbreviated herein as "Reply Brief to IA's Brief."

Finally, the trial court entered two orders that are specifically at issue in this appeal. Each order was signed by the trial court on August 15, 2012. First, the trial court entered a Second Revised Order on Motion for Summary Judgment, referred to herein as the "Second MSJ Order." (CR 495-96.) Second, the trial court entered an Order on Written and Oral Motions, abbreviated as "Order on Motions." (CR 498-500.)

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REPLY ARGUMENTS

The Heirs' Response cobbles together disjointed bits, pieces and phrases from the Texas Probate Code ("TPC"), blends them with misstatements of case law, and then ignores not only the Constitution but also the Property Code and TPC as both are actually written. The result is an obtuse "Response" that misses the mark altogether.

The Heirs' "*Summary*" is emblematic of the Response's abject failure to address the law and facts (Response, p. 1). It tries to frame the "issue" before the Court as if it were "all-about" partition. While a great deal of the Response reflects the Heirs' unprecedented "take" on partition – in fact their Response's argument is far, far broader. If adopted it would literally throw out the Property Code, while rewriting the TPC and ignoring several provisions of the Constitution, altogether. Additionally, if this "*Summary*" is truly the succinct expression of the Heirs' "issue" in this appeal as the Heirs perceive it, it fails instantly upon the mere review of the plain language of the TPC. *See, e.g.,* TPC §§ 3(l), 150, 284, 373(c), and 45(b). All these sections of the TPC, when properly read and construed in harmony, directly contradict the Heirs' position. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) ("we look to the statute as a whole and strive to give it a meaning that is in harmony with other provisions").

I. As a threshold matter: Heirs have no appellate standing

First, the Heirs simply have no standing to appeal. Despite numerous chances to put forth a defense on the standing issue, the Heirs' entire response on this issue was the scant few pages they filed January 21, 2013. Even now, effectively given an opportunity to augment their prior response on standing, the Heirs affirmatively declined (Response, p. 2.) They declined because they have absolutely not a legal leg to stand on, nor any plausible explanation to support this Court's jurisdiction over their appeal. Absent this Court's determination on Mrs. Hopper's Motion to Dismiss, Mrs. Hopper states as follows:

II. TPC cannot/does not alter retained/vested property rights

At the outset, it is worth noting that the Court cannot do what the Heirs ask without either ignoring or rewriting Texas property law. In this regard, Texas probate law takes Texas property law, as derived both from the Texas Constitution and the statutes, as it finds it – not the reverse. That is, probate law applies to the pre-existing Constitutionally and statutorily derived property interests as set out by the State of Texas – which the TPC neither alters nor was designed to alter – and upon those vested property interests works out exactly "who" is entitled to exactly "what" and "why." This is a crucial distinction, for Texas probate law makes clear that those

who possess ownership rights in property, prior to a person's death, are not stripped of those rights on that other person's death.

This is true equally whether there is an intestacy or a will. Hence, even a will cannot alter the nature of these fundamental vested property rights – absent the consent of the party (here, the surviving spouse) whose property rights are subject to being affected. *Wright v. Wright*, 154 Tex. 138, 274 S.W.2d 670, 672-75 (1955). In other words, a surviving spouse does not suddenly lose his/her now-vested (former) community property interest(s) the moment the other spouse dies. Nor, in an intestacy, does an heir suddenly have some ownership interest in a surviving spouse's (former) community property interest. Rather, those interests were owned by the surviving spouse before the other spouse's death, and are "retained by" the surviving spouse after that death. TPC §45 (b).

In contrast, the Heirs have refused to recognize that the precepts of Texas property law inform and proscribe the permissible range of actions that both an independent administrator and a probate court itself may make upon property that in one fashion or another is "under administration." In this case, virtually 100% of all the assets "under administration" were owned pre-death, in community, by Mr. and Mrs.

Hopper.[1] Because Texas is an "item state," each and every item of property, however large or small, was owned in equal undivided interests by the parties while both lived. *See Wright*, 274 S.W.2d at 672-75; *see also* Mrs. Hopper's Brief at 37-40. When Mr. Hopper died, the community dissolved as a matter of law.[2]

The Heirs' lawyer in the trial court, Professor Stanley Johanson, confirmed in his Treatise that on facts identical to these, Mrs. Hopper's legal position is exactly applicable and correct. *See* Mrs. Hopper's Brief at p. 37, n. 25 and p. 46, *quoting* Johanson, and Professor McKnight at n. 24. Thus, the Heirs' position runs directly counter both to this settled precept of property law – and their own lawyer's position. As pointed out in Mrs. Hopper's MSJ and in this appeal, the TPC is supposed to not only follow the law of community property and the Texas Constitution, but also it must be understood and construed as internally harmonious with itself. *See City of Dallas,* 304 S.W.3d at 384.

In contrast, the Heirs' positions do not harmonize or comport with the TPC in any consistent fashion and would yield wildly different results,

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[1] The Heirs state and admit the small amount of Mr. Hopper's separate property in the estate is "not at issue." (Heirs' Response at p. 16, n. 8.)

[2] The Heirs' analysis of both *Stewart* and *Anderson* are completely inapposite given their respective holdings. The lack of an "administration" does not affect *Stewart's* applicability, nor *Anderson's,* for an IA cannot alter vested property rights of the survivor, and thus both cases are correct statements of the governing law as cited, favoring Mrs. Hopper's position. *See also* TPC §45(b). *See also Taylor, infra* at 5-9.

depending on the "asset mix" and amount of property at issue. (*See* Mrs. Hopper's Brief, pp. 53-55.) In this regard, the Heirs offer the Court an idiosyncratic "pick and choose" series of invalid "explanations" that are not only legally internally inconsistent, but create a senseless cacophony.

For example, the primary cases relied on by the Heirs (*see infra* at pp.16-17), supposedly supporting a mandatory partition of the Constitutional Homestead (*see* Heirs' Reply at 20-21, 38-40), all long pre-date 1956: the effective date for the Legislature's enactment, also post-*Wright* (1955), of TPC § 284 (codifying Constitution's prohibition against partition of a surviving spouse's Constitutional Homestead) and TPC § 45(b) (stating that the surviving spouse "is entitled to" ½ of the former community property).[3] Of course, the Heirs' view was never the law in Texas, as the Texas Constitution has always strictly prohibited partitioning a surviving spouse's Constitutional Homestead. *See* Tex. Const. art. XVI, § 52, § 51. Importantly, the 1956 case on the intestate death of H.F. Taylor, *George v. Taylor*, 296 S.W.2d 620, 623 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.) ("*Taylor*"), confirms exactly Mrs. Hopper's position, including that a Constitutional Homestead is not subject to intestate estate

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[3] The language of the original TPC § 45(b), upon which *Taylor* (*see Taylor*, 296 S.W.2d at 622-23) was decided (wholly favorable to Mrs. Hopper's position), was not nearly as strong in favor of Mrs. Hopper as the current version (enacted in 1991). In this regard, TPC § 45(b) now provides that the surviving spouse's ½ former community property interest is "retained by" her/him. *See* TPC § 45(b).

administration, (except to pay mortgage debts/liens) nor any partition.

Taylor[4] states:

> It must also be remembered that the property, as **'the [Constitutional] Homestead', was not subject to administration as a part of the estate** of H.F. Taylor upon the occasion of his death.
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> . . .
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> [T]he homestead. . .vested immediately in his heirs free of any of his debts (except as to indebtedness running against the 'Homestead' as such, as for instance purchase money due upon it or other constitutional lien), but subject to its use and occupancy by his wife, as the surviving constituent of the family. The premises, **from that moment,** became the joint property of Mrs. Taylor and the heirs of her deceased husband.
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> . . .
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> . . . the subject property was never chargeable with the debts of H.F. Taylor, though any other part of his estate which was the community estate of himself and his wife might have been. The reason this was so was because of its special homestead status. . . . **It was no longer community property after it so descended**, for the part inherited by the heirs was vested in them, subject only to his wife's right of 'Homestead.'
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> . . .
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> It is to be remembered that from and **after the death of her husband Mrs. Taylor owned an undivided one-half interest in and to the property as a tenant in common with the heirs of her husband** (or at least in cotenancy so far as requirements of rules relating thereto permit—in light of the requirement of possession as to the Homestead). **Her estate was separate and not in community with said heirs as it had formerly been with her husband. Community estates are possible only between husband and wife and the character necessarily changes upon the death of either.**

Taylor, 296 S.W.2d at 624-25 [bracketed material and bold emphasis added for clarity]. In light of *Taylor*, the Texas Constitution and TPC §§

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[4] *See supra* n. 3. Note also that Johanson's TPC Commentary to § 45(b) follows *Taylor* exactly.

3(l), 45(b) and 284, the Heirs have no possible defense against Mrs. Hopper's MSJ, nor any further claim on appeal, even if they still possessed standing – which they do not. Nonetheless, the Heirs have pressed on, claiming "rights" the law does not contain or grant.

In fact, there is only one "sub-type" of property law that even *hints* at the kinds of powers the Heirs *wish* the IA (or the probate court) possessed to achieve the result the Heirs' effectively request and desire – *property division as if this were a divorce, under the divorce statutes.*

Here the Heirs, without any Constitutional or statutory basis offered as support, ask this Court to order, retrospectively (as if the Heirs still owned Robledo and it was still under administration), a divorce-type "resolution" in their favor. Essentially, the Heirs request this Court to ignore the applicable law, don the hat of "equity" – as if this were a divorce – and make a "just and right" equitable division of post-death property "in the aggregate" (the vast majority of which former community property, including Robledo, is now no longer even under § 177 administration) – also completely ignoring Texas' adoption of the item theory.[5] *See also Wright*, 274 S.W.2d at 672-75. *Cf.* Tex. Family Code § 7.001 (Vernon 2012)

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[5] Note too, that express right of partition between living spouses under Article XVI, § 15 of the Texas Constitution references the "community interest of one spouse. . . in any property," thereby expressly adopting the item theory: that the community property interests of a spouse exist, property-by-property. *See Wright,* 274 S.W.2d at 672-675.

(in a divorce or annulment, the court shall order a division of all community property "in a manner that the court deems just and right").

It is worth noting that the Texas Constitution defines the community and separate property of spouses in a marriage, as well. *See, e.g.,* Tex. Const. Art. XVI, § 15. But the Constitution expressly provides that "laws shall be passed more clearly defining the **rights of the spouses**." *Id.* (emphasis added). In other words, this provision of the Constitution expressly granted the Legislature the power to legislate the unwinding/division of all property in a divorce **between spouses**. Tex. Family Code § 7.001. In contrast, the Texas Constitution, Article XVI, §§ 52, 51, plainly states that a Constitutional Homestead **cannot be partitioned** on the death of one spouse. The Legislature adopted this express Constitutional prohibition as far back as 1956. *See* TPC § 284. As between these differing Constitutional provisions (Art. 16 – § 15 versus §§ 52, 51), each addressing fundamental property rights, it is *only* in a divorce where the Constitution provides for the right of court-imposed equitable partition of all aggregated community property as "between living spouses."

But this is not a divorce case. The "partition" Appellant Heirs seek is between a surviving spouse and mere heirs. Thus, the "equitable" provision of Constitution, Art. 16, § 15, regarding that kind of (divorce) partition, is inapplicable. Instead, the mandatory provisions of Art. 16, §§ 52, 51,

prohibiting any partition, do apply. These applicable provisions not only define and grant the unique Constitutional Homestead, they specifically prohibit any right to partition that mere heirs or other transferees might otherwise have (were this residence not a Constitutional Homestead), as property interest holders under Property Code § 23.001 (or otherwise), as inheritors/transferees of an ordinary (but not, as here, Constitutionally-protected) real-property interest. *See Taylor*, 296 S.W.2d at 623-24.

The statutory and Constitutional problems, inherent in the Heirs' fundamental misapprehensions of the law,[6] are both fatal and almost too numerous to list. Nonetheless, here are just a few, all worth pondering.

First, again unlike a divorce case between living spouses, where a community "homestead" is always divisible between those spouses and saleable via partition (which a divorce court can equitably order), the Constitution forbids partition against a surviving spouse of the specially granted Constitutional Homestead. No one can sell the Constitutional Homestead or deprive the survivor of it, except by forced sale to satisfy debts (e.g., mortgage) on the Homestead. Tex. Const. Art. XVI, § 52, § 51.

Second, here the fee underlying the Constitutional Homestead is not only no longer under administration (*see* IA's voluntary Deed, June 25, 2012), it is no longer even owned by the Heirs. *See supra* at p. 1.

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[6] *See* opening paragraph, *supra* at pp.1-2.

Third, prior to death, the Heirs-to-be do not have either a legal or equitable interest in the community property. Certainly, they have *no* interest in Mrs. Hopper's half interest (former community) in each item of property. *No one does; it's hers and hers alone.* The TPC makes it clear her ½ of each item is "retained by" her as the surviving spouse. TPC §45(b).

Fourth, the Legislature has never attempted: to alter controlling property law (much less as to the Constitutional Homestead); to do so to mirror divorce law; or to create such a "just and right" equitable division approach in a probate context.[7] Instead, the Legislature chose to narrowly define the term "estate"[8] and provide for treatment of *estate property* in accordance with the TPC, Texas Constitution and property law. In this same vein, the Legislature left property "retained by" the survivor alone, thereby ensuring it—consistent with property and Constitutional law—remains with its proper owner (subject to paying third-party debts, of course). TPC § 45(b); *Taylor*, 296 S.W.2d at 623-24.

Again, that is not what the Heirs advocate. Instead, in contravention of Texas' item law, the Heirs demand a division of (1) estate property, *plus*

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[7] Indeed, the Legislature may be Constitutionally prohibited from doing so in this regard, given Texas Constitution, art. XVI, § 15, enshrining the item theory.

[8] **The TPC states: "'Estate' denotes the real and personal property of a decedent . . . .**" TPC § 3(l) (bold emphasis added). This definition eviscerates the Heirs' argument that TPC § 37 somehow makes the "estate" mean all of the pre-death community (*see* Heirs' Response at pp. 7, 8), and ignores the plain (and only possible) meaning of TPC § 45(b)'s language regarding property "retained by" the surviving spouse, which property is unarguably not the "estate's."

(2) Mrs. Hopper's now-separate property, all aggregated together, as their version of a "fairness." But how is it "fair"/"equitable" to take from Mrs. Hopper what is solely hers as a matter of Constitutional property law? The Heirs offer no actual legal citation to support their proposal to divest Mrs. Hopper of her own separate property.

To "interpret" the TPC as the Heirs advocate would require the Court to impermissibly delete and then create and engraft wholly new statutory language. *See, e.g., Laidlaw Waste Sys. (Dallas), Inc. v. Wilmer,* 904 S.W.2d 656, 659 (Tex. 1995) ("courts should not insert words in a statute except to give effect to clear legislative intent"). *See also* IA's Brief filed April 3, 2013 at pp. 30-31.

Finally, notwithstanding the foregoing, the Constitutional Homestead cannot be partitioned under any analysis or circumstances without the surviving spouse's consent. The Constitution plainly says so. *See* Tex. Const. Art. XVI, § 52, § 51. The TPC also plainly says so. TPC § 284.

III. No general rearrangement of "retained"/vested property interests is allowed by the TPC, especially with no debts at issue

The TPC does not allow for the "rearrangement" of property interests between heirs and a non-heir surviving spouse as to property "retained by" the surviving spouse. *See* TPC § 45(b). The Heirs cannot, nor do they even attempt to, deal with § 45(b). The fact of "retained" property interests blows

apart the Heirs' "theory" in this case, entirely. Their probate theory is bizarre precisely because it expressly ignores the pre-existing property rights of Mrs. Hopper and pretends the drafters of the TPC were equally ignorant of Texas property law. They were not. As the Heirs' lawyer, Professor Johanson, admits, Texas is an "item" state. (*See* Mrs. Hopper's Brief at p. 37, ns. 24-25; p. 46.) That is, during the course of marriage, the two parties to that marriage own each and every item of community property in equal undivided shares – they do not own a generalized ½ interest in the various properties as part of an aggregated whole.

Even worse, the Heirs ignore the precise definition of the term "estate" under TPC § 3(l) (*see supra* at n. 8). In this case, the "estate" is no more or less than Mr. Hopper's undivided ½ interest in each and every item of the (former) community, held at the instant before his death, plus the tiny smattering of separate property he had. *That's it.*

To further their efforts to *dis*harmonize the TPC provisions, the Heirs pretend the fact of TPC § 177 administration somehow "changes" or "affects" the ownership of the property interests administered. It does not. Merely being subject to "administration" for payment of debts cannot and does not alter the nature of the property interests extant and held by the married couple at the moment of death, or fixed in the instant after death, when the surviving spouse was vested with direct separate ownership of an

undivided interest in each and every item of former community property. Those interests remain intact and inviolate when the administration begins. No amount of arguing changes that fact. Likewise, the Heirs' request for either a partition or distribution under TPC § 149(b), whether timely filed or not (and both the IA and Mrs. Hopper agree the filing was not timely[9]), cannot and does not change the defined property interests held respectively by the estate and Mrs. Hopper at death.

Layered on top of those statutory property interests is the special property interest created by the Constitution, Art. 16, §§ 52, 51, regarding the Constitutional Homestead. This special Constitutional grant trumps both the ordinary application of Texas property law, and its application under the TPC as to one item: the Constitutional Homestead for the surviving spouse. This Constitutional grant of a Homestead exists irrespective of whether the residence, to which the Constitutional Homestead applies, was held in community by the Decedent and surviving spouse or even where the Decedent owned the whole fee underlying the residence in which he and the surviving spouse resided at the moment of his death. Whether the fee underlying the Constitutional Homestead may be wholly an asset of the estate (in the instance where a residence was the separate property of the decedent)—or as here, where the residence was

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[9] See IA's Brief, p. 31, n. 8.

indisputably owned as community property prior to death—either way it is a special class of Constitutionally-protected property in favor of the survivor. Either way, too, under TPC § 177, upon death, the fee becomes "subject to administration."[10]

That "administration," however, has a limited purpose: payment of debts.[11] The only purpose of TPC § 177 is to ensure that when one spouse dies, creditors are not forgotten or ignored by the surviving spouse—even where there is a Constitutional Homestead—but are paid. The IA (or Probate Court) is authorized to either pay from cash under administration, or to liquidate such assets as are required, *to settle the debts of the community*. These are not debts of the estate, only, but rather joint debts

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[10] As to what is "subject to administration," the Heirs' Response (p. 5, n. 4) ignores that Mrs. Hopper in fact asked the whole of the trial court's Second MSJ Order be set aside and that Mrs. Hopper's MSJ instead be granted (*see, e.g.,* Mrs. Hopper's Prayer in her Brief at p. 100). The Heirs' statement—that Mrs. Hopper did not attack the "*residence homestead*" (as the Heirs term it), as being subject to administration, is incorrect. (*See, e.g.,* Mrs. Hopper's Brief, Cross-Appeal Issue No. 3.) In fact, Mrs. Hopper has steadfastly maintained the residence was subject to administration, but the Constitutional Homestead was not. The Heirs' Response combines words and two separate concepts in a way not used by Mrs. Hopper, and thus creates confusion by this deliberate misjoinder of words and concepts.

[11] Specifically, even Mrs. Hopper's undivided one-half interest was subject to administration to pay debts. Notwithstanding, the Constitutional Homestead itself was never subject to being partitioned, indeed any partition of either the Constitutional Homestead, or even the underlying fee, could only have been initiated by Mrs. Hopper and with her consent. *See* TPC § 385; *Wright,* 274 S.W.2d at 672-75. Thus, the Constitutional Homestead prevents the trial court or anyone else affecting Mrs. Hopper's exclusive use and possession of Robledo through administration (except for debts) or via partition – at all. The Heirs create confusion by combining the separate concepts of (1) administration of Robledo to pay debts, and (2) the Constitutional Homestead upon Robledo, which is inviolate.

that both halves of the former community owed jointly and severally during married life. As exhaustively detailed previously (*see, e.g.,* Mrs. Hopper's Reply Brief to IA's Brief at pp. 3-6, and its Appendix), and confirmed by *Taylor,* and the IA's own admissions and failure of any action, *there was never any need to, or actual "administration" of, the Homestead.*

Again, under TPC §§ 284, 385, the Texas Constitution, *Taylor,* and the IA's repeated admissions (*see* Reply Brief to IA's Brief at 3-7), no sale, much less partition (direct or indirect) of Robledo or the Constitutional Homestead could be had under the applicable facts and law, particularly against Mrs. Hopper's wishes. *See Wright*, 296 S.W.2d at 672-75. Not only did she make no election permitting aggregation and sale of "administered" TPC § 177 items, uncontestedly she repeatedly expressly fought and rejected it and still does. (*See, e.g.,* CR 63 – Mrs. Hopper's MSJ Affidavit, p. 3.)

Absent her direct election under *Wright*, no forced partition could be had by either the IA or even the probate court, regarding the fee[12] underlying Robledo or the Constitutional Homestead itself. *See Wright*, 274 S.W.2d at 672-75; Tex. Const. Art. XVI, §§52, 51; TPC §§ 284, 385. *Taylor,* 296 S.W.2d at 623-24. That the Heirs have maintained otherwise is absurd given there was no authority for a forced partition – and certainly

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[12] Or for that matter, any of her now-separate undivided half interests in each of every item of the former community.

not under TPC § 150.[13] Likewise, the Heirs claiming that they "really didn't seek a partition of Robledo," but merely wanted to include/aggregate its value in an overall partition with other assets "under administration" – that is simply a forced partition under a different name and using a back-door approach: a distinction without a difference. Neither the Heirs nor the IA had any right to rearrange property interests in which Mrs. Hopper already separately owned (under Texas' item theory approach) an *undivided ½ of each and every one* – especially where no debts necessitated liquidation of those assets of Mrs. Hopper to pay her share of third-party creditors.

The Heirs' idea of "fairness" is to un-Constitutionally rearrange Mrs. Hopper's property interests in their favor, by stripping from Mrs. Hopper, without her consent, a whole bushel-basket-full of other properties, in order to "equalize" and thus cash-out for the equivalent, the "true value" of their otherwise burdened half fee interest in Robledo–thus defeating her Constitutional Homestead.[14] No such precedent exists.

Even the IA, Mrs. Hopper's fiduciary, whom she was forced to sue and who has in turn opposed Mrs. Hopper consistently on matters large

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[13] Under TPC § 385, only the surviving spouse can force/insist upon a partition.

[14] That is under the Heirs' approach. Mrs. Hopper then would have no pesky "need" for a non-partitionable and *free* Constitutional Homestead – as she would own the whole fee outright after having been forced to pay for it by a forced trade of/with other property interests she owned (*see* Mrs. Hopper's Brief on point, at pp. 41-56). If the Heirs' position were to be mandated in Texas, then at the mere demand of an heir in intestacy the Constitutional Homestead would be easily defeated and cease to exist.

and small, finally had to admit that it could find no precedent supporting the Heirs' view of the law in this regard. The IA specifically stated:

> The Children's [Heirs'] claimed 124 years of precedent does not advance their cause. Instead, their 124 years of precedent includes not a single case holding that an independent executor or administrator *must* seek a judicial partition before distributing property subject to administration to the beneficiaries of the estate and the surviving spouse, in accordance with their respective ownership interests in such property.
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> . . .
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> They [the Heirs] have now pivoted to rely far more heavily on Probate Code §149B, a provision that they barely mentioned in the briefing in the Probate Court. The clear language of Section 150 makes obvious why they have changed course.
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> . . .
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> Moving away from Section 150 on appeal, the Children now argue that Probate Code §149B provides them an "absolute right" to a judicial partition. Children's Brief at 16-18. But that argument is no more fruitful for the Children than their theory about Section 150.
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> . . .
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> The statute in no way gives the Children an absolute right to a partition of the entire estate.

See IA's Brief at pp. 29-33 (bracketed material added for clarity).

The fact is that the IA, despite its inexcusable delays,[15] finally on June 25, 2012, got around to deeding one-half the fee in Robledo to the Heirs[16] and by that Deed also simply confirmed that the other one-half all along been held "*in* Mrs. Hopper" in undivided interests since the date of

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[15] *See* Mrs. Hopper's Reply to the IA's Brief at pp. 3-7.

[16] Of course, the Heirs in fact already owned the fee underlying Robledo in undivided interests with Mrs. Hopper, from the instant of Mr. Hopper's death, anyway – try as they might to pretend they didn't, and despite repeated denials of undivided ownership.

Decedent's death.[17] *Much more importantly, the Deed expressly and formally released Robledo that very day from the non-necessary and non-existent "administration."*[18] In fact, the IA never "administered" Robledo at all – indeed it was never required. *See Taylor,* 296 S.W.2d at 623-24. *See also* Reply Brief to IA's Brief at 3-7.

Now, of course, the Heirs, who do not own Robledo at all,[19] grandly "promise" that if the Court were only to rule in their favor they would be happy to "deed it back to the estate." (Heirs' Response at p. 28.) How this might be accomplished or how such pledge could be enforced (given the Heirs no longer own an interest in Robledo) is, of course, never explained.

The Heirs' Response also makes many other unsupportable claims about partition and misstatements concerning Mrs. Hopper's supposed "positions." But to set the record straight, consider this easy example as being representative of Mrs. Hopper's actual position on non-Homestead partition. Assume Mr. and Mrs. Hopper, in addition to Robledo (which in life was their <u>community</u> homestead), had also owned, in community, a

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[17] The Deed states: "*At the death of Decedent, the other undivided one-half interest in the Property <u>was owned</u> by Jo N. Hopper, the surviving widow of the Decedent* (underlined and italic emphasis added)." (CR 492; Mrs. Hopper's Brief, Apx. D at p. 2.) Note the use of the past-tense by the phrase: "was owned." (*Id.*)

[18] The Deed also states: "*the Grantor [IA] by this instrument intends to document its release of any right it has to continue to administer the undivided fifty percent interest in the Property* ***owned*** *by Jo N. Hopper (bold and italic emphasis added). . .*" (CR 492; Mrs. Hopper's Brief, Apx. D at 2.)

[19] *See* Mrs. Hopper's Motion to Dismiss.

one-mile square, utterly flat/featureless piece of farmland (i.e., real property which is not a homestead) bordering no road. At his intestate death, whether under the IA's administration or pursuant to either TPC § 48 or § 149B (if properly filed), the interests in the farmland owned by the *estate* (which of course, immediately vested in the heirs at death) would first have been confirmed. Then, if there were multiple heirs to the estate's interest in the farm, those could have been sorted out among themselves, or if required, by a *permissive* TPC § 150 partition of the estate's undivided half of the farm. Of course, the Heirs' Response continues to ignore wholly the expressly permissive nature of TPC § 150, altogether (Response at p. 30 – the IA "was obligated" to seek a § 150 partition). The Heirs ignore the actual language of § 150 because they simply cannot and do not logically address (much less refute) the fact that this section, which they claim as the basis for their whole analysis, is expressly *permissive* and *not mandatory*.[20] *Id.*; *see* Tex. Gov't Code § 311.016(1) (Vernon 2012) ("'May' creates discretionary authority"). Neither the trial court nor the IA was required to "partition" anything–and certainly no authority existed to partition non-

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[20] Indeed even the IA in its Brief (p. 30) noted the Heirs' wholly obtuse position regarding the *explicitly permissive* language in § 150 and criticized the Heirs' original Brief's position (of November 21, 2012). In this regard, the IA stated: "*That permissive language is entirely inconsistent with the [Heirs] theory that a judicial partition proceeding is mandatory . . . . The Children [Heirs] posit that the permissive language in § 150 is not really permissive . . . . The Children are attempting to engraft language onto this statute that is simply not there, which is contrary to the basic tenents of statutory construction.*" [bracketed material added for clarity]

estate property, whether under administration or not. *Id.*; *see also* TPC § 3(l). Contrary to the Heirs' Response (p. 11) and its "*Summary*" (p. 1), neither the Heirs, the IA, nor even the trial court, could possibly force a partition on Mrs. Hopper's vested separate property. Mandatory partition can only be invoked by the surviving spouse herself. TPC § 385.

But setting this aside, in the above hypothetical, once a determination had been made as to who ultimately owned the estate's portion of the farmland, as between Mrs. Hopper and whoever these heirs might have been determined to be to the other half of the farm, the parties could agree among themselves what was to happen to the farm. Failing that, a regular partition under Texas property law (not under the TPC) could have been filed by any of the actual interest owners in the farm–either Mrs. Hopper or the Heirs. *See* Tex. Prop. Code § 23.001 (Vernon 2012). At that point a court could either draw a line down the center of the land and give separate deeds out for either side of the ½ square mile parcel now respectively divided[21]–or order a sale of the whole farm and divide the proceeds according to the individual interests owned in the undivided whole. But that Property Code § 23.001 partition would not have been a partition as envisioned under the TPC. Of course that § 23.001 partition could not apply

[21] Of course in this scenario, the ½ previously owned by the estate (itself) might be held in several "pieces" after the internal estate partition process of estate property between and among the estate's heirs was completed. That kind of partition is available to heirs, without need for the survivor's consent.

to the Constitutional Homestead, but could always readily apply to a non-homestead property in which two or more parties were undivided interest owners. That this process may appear unwieldy or be bothersome to the Heirs, is beside the point. It is the law.

IV. The Heirs' other arguments lack merit

A. A court must have on-going subject-matter jurisdiction to render rulings *at the time rendered*

The Heirs misstate Mrs. Hopper's position regarding subject matter-jurisdiction. *See* Heirs' Response at pp. 22-24. While the trial court generally had jurisdiction to litigate the probate matter, it lacked jurisdiction to issue declarations allegedly "permitting" distribution of Robledo *after* the fact of the IA already releasing Robledo from administration. *See* Mrs. Hopper's Brief at pp. 56-61; (CR 491-94 – IA's Deed of June 25, 2012.) The Heirs' response, "that subsequent events cannot divest the court of jurisdiction," ignores altogether: the mootness doctrine, the separation of powers doctrine and the doctrine prohibiting impermissible advisory opinions.

B. The Heirs admit that the trial court's "clawback" rulings are indefensible

The Heirs' attempted "defense" of the trial court's "clawback rulings" are meritless. First, the Heirs find themselves forced to admit these rulings had "procedural defects" (Response, p. 29)–so even the Heirs know they

cannot and should not stand–however much they now wish otherwise. Nonetheless, they go on to "defend" them–even though the Heirs also describe and admit the rulings as being "the trial court's 'Plan B': a back-up plan." (Response at pp. 27-29.) But "back-up" rulings are, by their very nature, hypothetical rulings, and are thereby the very essence of advisory opinions (which also violate the mootness doctrine). They're impermissible. Given these admissions, all the Heirs' arguments are wholly unpersuasive and defective. Further, *Taylor* makes clear no "charges of administration" can be lodged against non-estate property—which holding eviscerates the broadly worded "clawback." *See Taylor*, 296 S.W.2d at 623.

C. An "equitable partition" is not permitted against a surviving spouse's former community property (absent consent); nor must all estates be "partitioned"

The Heirs' Response (at p. 26) makes another throwaway, off-point assertion: it cites TPC §38(b) for the proposition that an "equitable partition" may be had. But TPC § 38(b) specifically states it does not apply to a "community estate"—so it is not possibly on-point where all Mr. and Mrs. Hopper's respective property was essentially 100% community in nature, as the Heirs "Facts" admit (Heirs' Brief at p. 1; Response at p. 16, n. 8; *see also supra* n. 1 herein)—not to mention she has not consented to same.

Likewise, the Heirs' bizarre statement: "All estates must be partitioned." (*See* Heirs' Response at p. 33) is both without citation and wrong. Again, consider the example of a one-asset intestate "estate," containing only a one-half fee-interest in a non-mortgaged community residence transmutted into a Constitutional Homestead upon death. TPC §284 and the Texas Constitution would expressly prohibit an unconsented partition of such estate's only asset. Further, in any event, the surviving spouse's one-half (former) community property fee interest (the burdened one-half fee interest) is never part of the "estate." *See* TPC § 3(l).

D. There is no monetary "value" placed on a survivor's Constitutional Homestead

Oddly, the Heirs cite cases confirming the Constitutional Homestead has no monetary value placed on it. *See* Heirs' Response at 38-40. *See, e.g., Hailey v. Hail*, 135 S.W. 663, 664 (Tex. Civ. App. 1911, writ ref'd) (regarding the subject of "valuation": "the homestead rights are not to be taken into account"). Mrs. Hopper agrees, and has never asked any court to give her monetary value for her Constitutional Homestead. Yet the Heirs ask the Court do that very thing in reverse: require Mrs. Hopper to buy-out their underlying fee interest in Robledo with the price of that buy-out based, in part, on the "possessory value" for her lifetime of her Constitutional Homestead. Thus, the Heirs improperly request cash recompense for the alleged diminution in monetary value from the Homestead's "burden" upon

the ½ fee interest they "own" (previously owned —the Heirs have since sold their interest in Robledo). Contrast Mrs. Hopper never seeking "value for," or "to value," the Constitutional Homestead, which Constitutional Homestead she has repeatedly characterized as "free," either as part of or in connection with her resolute opposition to any forced partition.

E. The Heirs' hypocritical invocation (and odd notion) of "fairness"

The Heirs' last pages focus on their desire not to be obligated to pay for anything. As set out previously, the Heirs' notion of "fairness" is that they are "cashed out" (apparently even as to property they have already sold and are no longer "burdened" to hold), leaving Mrs. Hopper with such burdened and indebted assets/property as they think "fair." However, the Issues in this Appeal are not to be decided on anyone's subjective idea of "fairness" – but rather on the law. That said, if "fairness" were the test, how could the Heirs ever possibly assert that their approach is fair? They could not, because what they propose is manifestly *unfair*.

CONCLUSION

If the TPC's provisions (including §§ 3(l), 45(b), 150, 284, 373(c), and 385) are read together in harmony, then in light of the Texas Constitution Article XVI, §§ 52, 51, and 15, and Texas property law generally, the Heirs' Response and arguments are, demonstrably, completely meritless. The undivided interests in property items the Heirs seek, or seek to force be

partitioned, were never theirs, much less theirs to aggregate, "re-arrange," and then partition-at-will against and over Mrs. Hopper's protests. Instead, they were owned by Mrs. Hopper prior to her husband's death. After his death, those undivided interests were "retained by" her, item-by-item, as the community dissolved and ceased to exist. All of the Heirs' proclaimed notions of "fairness" (and by "fairness," they really mean conduct favoring them – in direct contravention of the Texas Constitution, property and probate law), do not change this.

Consequently, the Court should:

1.) Dismiss the Heirs' Appeal for lack of standing, with prejudice, or, alternatively, deny/overrule all of their Issues, positions and relief sought;

2.) Grant all of Mrs. Hopper's Issues, positions, and all relief sought in her Brief; and

3.) Grant Mrs. Hopper any other relief to which she is entitled, requested in her Appeal generally, her Brief, and all her other filings herein, incorporated by reference in support hereof.

Respectfully submitted,

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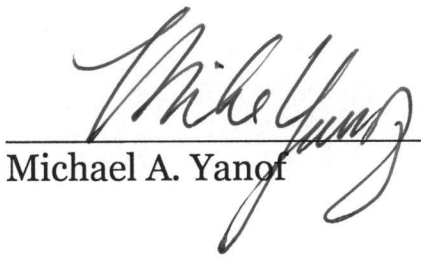
CERTIFICATE OF COMPLIANCE

Neither Texas Rule of Appellate Procedure 9, nor even Fifth Court Local Rule 10 (which this Court has adopted for this appeal) appear to contemplate a party being required to file (1) a reply brief as a cross-appellant (to a cross-appellee's response brief), and also (2) a separate reply brief to a third-party appellee's response brief. Mrs. Hopper is required to file two such replies here: one to the Heirs herein, and another to the IA (already filed). Reading Tex. R. App. P. 9 and Fifth Court Local Rule 10 together, it reasonably appears a 7,500 word count, or a 25-page limit, applies to this Reply Brief. Excluding those portions not included in the word count/page limit by Tex. R. App. P. 9.4(i)(1), this Brief complies with the Rules, as it is 6,489 words and 25 pages.



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CERTIFICATE OF SERVICE

I certify that I have transmitted a true and correct copy of the foregoing document to the counsel listed below this 18th day of June, 2013 as follows:

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